

CONFERENCE COMMITTEE REPORT DIGEST FOR EHB 1187

Citations Affected: IC 9-14-3; IC 23-17; IC 26-2-8; IC 23-17-13-2.

Synopsis: Nonprofit corporations. Conference committee report for EHB 1187. Provides that notice given by a nonprofit corporation (corporation) is fair and reasonable if the corporation provides notice by: (1) communicating in person; (2) mail or other method of delivery; or (3) other electronic means capable of verification. Requires a corporation to maintain a notice in a record unless the notice was given orally. Establishes when notice is effective. Requires a corporation to retain ballots for a certain period. Establishes circumstances under which contracts or transactions that involve conflicting interests of members, directors, members of a designated body, or officers are not void or voidable. (Current law establishes the circumstances under which contracts or transactions that involve conflicting interests of directors are not void or voidable.) Amends provisions that restrict certain actions by committees of directors. Allows: (1) boards of directors; and (2) members present at a committee meeting; to appoint alternate members of a committee. Allows corporations to create or authorize the creation of advisory committees. Provides that a constituent of a business entity and the business entity are presumed to have agreed to conduct certain actions electronically unless conducting the actions electronically is prohibited by the governing documents of the business entity or an express statement by the business entity. Establishes certain guidelines for the use of electronic records or electronic signatures. Makes other changes and conforming amendments. Repeals a provision that is replaced concerning conflicting interest contracts or transactions. **(This conference committee report: (1) removes certain definitions, allows notice to be given by any electronic means capable of verification, and removes a provision permitting notice to be given by radio, television, or public broadcast; (2) relocates certain provisions dealing with notice; (3) adds certain definitions to the Uniform Electronic Transactions Act, and provides that a constituent of a business entity and the business entity are presumed to have agreed to conduct certain actions electronically unless conducting the actions electronically is prohibited by the governing documents of the business entity or by an express statement by the business entity; (4) establishes certain guidelines for the use of electronic records or electronic signatures; and (5) makes conforming amendments.)**

Effective: July 1, 2008.

CONFERENCE COMMITTEE REPORT

MR. SPEAKER:

Your Conference Committee appointed to confer with a like committee from the Senate upon Engrossed Senate Amendments to Engrossed House Bill No. 1187 respectfully reports that said two committees have conferred and agreed as follows to wit:

that the House recede from its dissent from all Senate amendments and that the House now concur in all Senate amendments to the bill and that the bill be further amended as follows:

- 1 Delete everything after the enacting clause and insert the following:
- 2 SECTION 1. IC 9-14-3-0.5 IS AMENDED TO READ AS
- 3 FOLLOWS [EFFECTIVE JULY 1, 2008]: Sec. 0.5. As used in this
- 4 chapter, "electronic record" has the meaning set forth in
- 5 ~~IC 26-2-8-102(7)~~. **IC 26-2-8-102.**
- 6 SECTION 2. IC 9-14-3-0.8 IS AMENDED TO READ AS
- 7 FOLLOWS [EFFECTIVE JULY 1, 2008]: Sec. 0.8. As used in this
- 8 chapter, "electronic signature" has the meaning set forth in
- 9 ~~IC 26-2-8-102(8)~~. **IC 26-2-8-102.**
- 10 SECTION 3. IC 23-17-2-27 IS AMENDED TO READ AS
- 11 FOLLOWS [EFFECTIVE JULY 1, 2008]: Sec. 27. **(a)** "Vote" includes
- 12 authorization by written ballot, and **"voting" or "casting a vote"**
- 13 **includes the giving of written consent.**
- 14 **(b) Even if a person entitled to vote characterizes the conduct as**
- 15 **voting or casting a vote, the term does not include:**
- 16 **(1) recording the fact of abstention or failing to vote for a**
- 17 **candidate; or**
- 18 **(2) approving or disapproving of a matter.**
- 19 SECTION 4. IC 23-17-10-5 IS AMENDED TO READ AS
- 20 FOLLOWS [EFFECTIVE JULY 1, 2008]: Sec. 5. (a) A corporation
- 21 shall give notice ~~consistent with the corporation's bylaws~~ of meetings
- 22 of members in a fair and reasonable manner.

(b) A notice that conforms to the requirements of subsection (c) is fair and reasonable. However, other means of giving notice may also be fair and reasonable when all the circumstances are considered if notice of matters referred to in subsection (c)(2) is given as provided in subsection (c).

(c) **Unless fair and reasonable notice is otherwise specified in a corporation's bylaws**, notice is fair and reasonable if the following occur:

(1) The corporation notifies the corporation's members of the place, date, and time of each annual, regular, and special meeting of members not less than ten (10) days, or, if notice is mailed by other than first class or registered mail, thirty (30) days to sixty (60) days, before the meeting date.

(2) Notice of an annual or a regular meeting includes a description of any matter or matters to be considered at the meeting that must be approved by the members under ~~IC 23-17-13-2~~, **IC 23-17-13-2.5**, IC 23-17-16-13, IC 23-17-17-5, IC 23-17-19-4, IC 23-17-20-2, or IC 23-17-22-2.

(3) Notice of a special meeting includes a description of the purpose for which the meeting is called.

(4) A corporation provides notice by:

(A) communicating in person;

(B) mail or other method of delivery; or

(C) other electronic means capable of verification.

~~(4)~~ **(5)** For a corporation, other than a veteran's organization, having more than one thousand (1,000) members, notice of the place, date, and time of an annual, a regular, or a special meeting, and in the case of a special meeting, the purpose of the special meeting, may be given by one (1) publication in a newspaper of general circulation, printed in English, in the county in which the corporation has the corporation's principal office if the publication is made not less than ten (10) days and not more than thirty (30) days before the meeting date.

(d) Unless the bylaws require otherwise, if an annual, a regular, or a special meeting of members is adjourned to a different date, time, or place, notice is not required to be given of the new date, time, or place if the new date, time, or place is announced at the meeting before adjournment. If a new record date for the adjourned meeting is or must be fixed under section 7 of this chapter, however, notice of the adjourned meeting must be given under this section to persons who are members as of the new record date.

SECTION 6. IC 23-17-13-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2008]: Sec. 1. (a) A director shall, based on facts then known to the director, discharge duties as a director, including the director's duties as a member of a committee, as follows:

(1) In good faith.

(2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances.

(3) In a manner the director reasonably believes to be in the best interests of the corporation.

(b) In discharging the director's duties, a director may rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by one (1) of the following:

(1) An officer or employee of the corporation whom the director reasonably believes to be reliable and competent in the matters presented.

(2) Legal counsel, **certified** public accountants, or other persons as to matters the director reasonably believes are within the person's professional or expert competence.

(3) A committee of the board of directors of which the director is not a member if the director reasonably believes the committee merits confidence.

(4) In the case of religious corporations, religious authorities and ministers, priests, rabbis, or other persons whose position or duties in the religious organization the director believes justify reliance and confidence and whom the director believes to be reliable and competent in the matters presented.

(c) A director is not acting in good faith if the director has knowledge concerning a matter in question that makes reliance otherwise permitted by subsection (b) unwarranted.

(d) A director is not liable for an action taken as a director, or failure to take an action, unless the: ~~following conditions exist:~~

(1) ~~The~~ director has breached or failed to perform the duties of the director's office in compliance with this section; **and**

(2) ~~The~~ breach or failure to perform constitutes willful misconduct or recklessness.

(e) A director is not considered to be a trustee with respect to a corporation or with respect to any property held or administered by the corporation, including property that may be subject to restrictions imposed by the donor or transferor of the property.

SECTION 7. IC 23-17-13-2.5 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2008]: **Sec. 2.5. (a) This section applies unless the articles of incorporation or bylaws of a corporation provide otherwise.**

(b) Subject to subsection (c), a contract or transaction between:

(1) a corporation and one (1) or more of the corporation's members, directors, members of a designated body, or officers; or

(2) a corporation and any other corporation, partnership, association, or entity in which one (1) or more of the corporation's members, directors, officers, or members of a designated body:

(A) are members, directors, members of a designated body, or officers;

(B) hold a similar position; or

(C) have a financial interest;

is not void or voidable solely because of the relationship or interest, solely because the member, director, member of a designated body, or officer is present at or participates in the meeting of the board

of directors that authorizes the contract or transaction, or solely because the vote of the member, director, member of a designated body, or officer is counted for authorizing the contract or transaction.

(c) A contract or transaction described under subsection (b) is not void or voidable as provided under subsection (b) if one (1) or more of the following apply:

(1) The:

(A) material facts as to the:

(i) relationship or interest of a member, a director, a member of a designated body, or an officer; and

(ii) contract or transaction;

are disclosed or known to the board of directors; and

(B) board of directors in good faith authorizes the contract or transaction by the affirmative votes of a majority of the disinterested directors even if the disinterested directors are less than a quorum.

(2) The:

(A) material facts as to the:

(i) relationship or interest of the member, director, member of a designated body, or officer; and

(ii) contract or transaction;

are disclosed or known to the members who are entitled to vote on the contract or transaction; and

(B) contract or transaction is specifically approved in good faith by a vote of the members who are entitled to vote on the contract or transaction.

(3) The contract or transaction is fair as to the corporation at the time the contract or transaction is authorized, approved, or ratified by the board of directors or the members.

(d) Common or interested directors may be counted in determining the presence of a quorum at a meeting of the board that authorizes a contract or transaction described under subsection (b).

SECTION 8. IC 23-17-15-6 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2008]: Sec. 6. (a) Unless **this article**, the articles of incorporation, or bylaws provide otherwise, a board of directors may create at least one (1) ~~committee and appoint at least two (2) or more committees that consist of one (1) or more~~ members of the board of directors. ~~to serve on the committees.~~

(b) **Unless otherwise provided under this article**, the creation of a committee and appointment of members to the committee must be approved by the greater of: ~~the following:~~

(1) a majority of all the directors in office when the action is taken; **or**

(2) the number of directors required by articles of incorporation or bylaws to take action under section 5 of this chapter.

(c) Sections 1 through 5 of this chapter apply to committees of the board of directors and the members of committees.

(d) To the extent specified by the board of directors or in articles of incorporation or bylaws, a committee may exercise the authority of the

board of directors under IC 23-17-12-1.

(e) A committee may not do the following:

(1) Authorize distributions.

(2) Approve or recommend to members **action required to be approved by members under this article.**

~~(A) dissolution;~~

~~(B) merger;~~

~~(C) sale;~~

~~(D) pledge; or~~

~~(E) transfer;~~

~~of all or substantially all of a corporation's assets.~~

(3) ~~Elect, appoint, or remove directors or~~ **Subject to subsection (g),** fill vacancies on the board of directors or on a committee.

(4) Adopt, amend, or repeal ~~articles of incorporation or~~ bylaws.

(f) The creation of, delegation of authority to, or action by a committee does not alone constitute compliance by a director with the standards of conduct described under IC 23-17-13-1.

(g) The board of directors may appoint one (1) or more directors as alternate members of a committee to replace an absent or a disqualified member during the member's absence or disqualification. Unless the articles of incorporation, bylaws, or the resolution creating the committee provides otherwise, in the event of the absence or disqualification of a member of a committee, the members present at a meeting and not disqualified from voting may unanimously appoint another director to act in place of the absent or disqualified member.

(h) A corporation may create or authorize the creation of one (1) or more advisory committees whose members need not be directors.

SECTION 9. IC 23-17-27-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2008]: Sec. 1. (a) A corporation shall keep as permanent records a record of the following:

(1) Minutes of meetings of the corporation's members and board of directors.

(2) A record of actions taken by the members or directors without a meeting.

(3) A record of actions taken by committees of the board of directors as authorized under IC 23-17-15-6(d).

(b) A corporation shall maintain appropriate accounting records.

(c) A corporation or the corporation's agent shall maintain a record of the corporation's members in a form that permits preparation of a list of the names and addresses of all members, in alphabetical order by class, showing the number of votes each member is entitled to cast.

(d) A corporation shall maintain the corporation's records in written form or in another form capable of conversion into written form within a reasonable time.

(e) A corporation shall keep a copy of the following records at the corporation's principal office:

(1) The corporation's articles of incorporation or restated articles of incorporation and all amendments to the articles of incorporation currently in effect.

(2) The corporation's bylaws or restated bylaws and all amendments to the bylaws currently in effect.

(3) Resolutions adopted by the corporation's board of directors relating to the characteristics, qualifications, rights, limitations, and obligations of members or a class or category of members.

(4) The minutes of all meetings of members and records of all actions approved by the members for the past three (3) years.

(5) Written communications to members generally within the past three (3) years, including the financial statements furnished for the past three (3) years under section 6 of this chapter.

(6) A list of the names and business or home addresses of the corporation's current directors and officers.

(7) The corporation's most recent annual report delivered to the secretary of state under section 8 of this chapter.

(f) Except as otherwise provided in articles of incorporation or bylaws, ballots must be retained by a corporation until the earlier of the following:

(1) The date of the next annual meeting.

(2) One (1) year after the date the ballot was received.

SECTION 10. IC 23-17-28-5 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2008]: Sec. 5. Except as provided in ~~section 3~~ of this chapter **or other applicable law**, written notice is effective at the earliest of the following:

(1) When received.

(2) Five (5) days after the notice is mailed, as evidenced by the postmark or private carrier receipt, if mailed correctly addressed to the address listed in the most current records of the corporation.

(3) On the date shown on the return receipt, if sent by registered or certified United States mail, return receipt requested, and the receipt is signed by or on behalf of the addressee.

(4) Thirty (30) days after the notice is deposited with another method of the United States Postal Service other than first class, registered, or certified postage affixed, as evidenced by the postmark, if mailed correctly addressed to the address listed in the most current records of the corporation.

SECTION 11. IC 26-2-8-102 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2008]: Sec. 102. As used in this chapter:

(1) "Agreement" means the bargain of the parties in fact, as found in their language or inferred from other circumstances and from rules, regulations, and procedures given the effect of agreements under laws otherwise applicable to a particular transaction.

(2) "Automated transaction" means a transaction conducted or performed, in whole or in part, by electronic means or electronic records in which the acts or records of one (1) or both parties are not reviewed by an individual in the ordinary course in forming a contract, performing under an existing contract, or fulfilling an obligation required by the transaction.

(3) **"Business entity" means a corporation, nonprofit corporation, limited liability company, limited liability partnership, limited partnership, business trust, real estate**

investment trust, or any other entity that is formed under the requirements of applicable Indiana law.

(4) "Computer program" means a set of statements or instructions to be used directly or indirectly in an information processing system in order to bring about a certain result.

(5) "Constituent" means a person who holds a position defined in the business entity's organic law that permits the person, directly or indirectly, to own, manage, or operate a business entity either alone or with others. The term includes officers, directors, shareholders, members, managers, general partners, limited partners, partners, and persons occupying a similar status or performing similar functions for a business entity.

~~(4)~~ **(6)** "Contract" means the total legal obligation resulting from the parties' agreement as affected by this chapter and other applicable law.

~~(5)~~ **(7)** "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

~~(6)~~ **(8)** "Electronic agent" means a computer program or an electronic or other automated means used to initiate an action or respond to electronic records or performances in whole or in part without review by an individual at the time of the action or response.

~~(7)~~ **(9)** "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means.

~~(8)~~ **(10)** "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record.

(11) "Governing documents" means the publicly filed and nonpublicly filed organic documents of a business entity.

~~(9)~~ **(12)** "Governmental agency" means an executive, legislative, or judicial agency, department, board, commission, authority, institution, instrumentality, or other political subdivision of the state.

~~(10)~~ **(13)** "Information" means data, text, images, sounds, codes, computer programs, software, databases, or the like.

~~(11)~~ **(14)** "Information processing system" means an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information.

(15) "Organic actions" means actions, notices, consents, and signatures relating to the operation of a business entity that are undertaken among constituents of that business entity or among constituents of a business entity and that business entity. The term does not include the service of process or the service of a summons, subpoena, or other service contemplated by rules or statutes governing trial procedure, civil procedure, or comparable provisions.

~~(12)~~ **(16)** "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company,

association, joint venture, governmental agency, public corporation, or any other legal or commercial entity.

~~(13)~~ (17) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. **The term includes records transmitted in the course of organic actions.**

~~(14)~~ (18) "Security procedure" means a procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or for detecting changes or errors in the information in an electronic record. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment procedures.

~~(15)~~ (19) "Transaction" means an action or set of actions relating to the conduct of business, commercial, or governmental affairs and occurring between two (2) or more persons. **The term includes an organic action.**

SECTION 12. IC 26-2-8-104 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2008]: Sec. 104. (a) This chapter does not require that a record or signature be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.

(b) This chapter only applies to transactions between parties each of which has agreed to conduct transactions electronically. An agreement to conduct transactions electronically is determined from the context and surrounding circumstances, including the parties' conduct. **A constituent of a business entity and a business entity are presumed to have agreed to conduct organic actions electronically unless and to the extent:**

(1) the governing documents of the business entity limit or prohibit, in whole or in part, the use of electronic signatures, electronic records, or both; or

(2) the business entity expressly states the method, means, or requirement by which a constituent may respond to or participate in any organic action, including imposing a requirement that participants use a specific form of writing, record, or signature.

Unless and to the extent limited or prohibited, any electronic record or electronic signature to be sent to a constituent is properly sent if sent in the manner and to the electronic address or other means of receipt designated by the constituent to receive the electronic record or electronic signature as shown in the current records of the business entity. If the electronic record is a notice, it is effective when sent. Unless and to the extent limited or prohibited, any electronic record or electronic signature sent by a constituent to a business entity shall be considered properly sent if it is sent in a manner designated by the business entity to an electronic address or other location designated by the business entity in a publication or notice provided by the business entity to the constituent. If the electronic record is a notice, it is effective upon receipt. The publication or notice may be included in the

governing documents of the business entity, may be communicated to the constituent in writing, or may be transmitted by any other means selected by the business entity that is reasonably likely to convey the information to the constituent. A constituent or business entity may revoke or change any instruction regarding the manner, electronic address, or means of receipt the person requires for electronic records or electronic signatures by sending notice of the change and the corresponding new information.

(c) If a party agrees to conduct a transaction electronically, this chapter does not prohibit the party from refusing to conduct other transactions electronically. This subsection may not be varied by agreement.

(d) Except as otherwise provided in this chapter, the effect of any provision of this chapter may be varied by agreement. The presence in certain provisions of this chapter of the words "unless otherwise agreed", or words of similar import, does not imply that the effect of other provisions may not be varied by agreement.

(e) Whether an electronic record or electronic signature has legal consequences is determined by this chapter, if applicable, and otherwise by other applicable law.

SECTION 13. IC 26-2-8-106 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2008]: Sec. 106. (a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

(b) A contract may not be denied legal effect or enforceability solely because an electronic record **or electronic signature** was used in its formation.

(c) If a law requires a record to be in writing, or provides consequences if it is not, an electronic record satisfies the law.

(d) If a law requires a signature, or provides consequences in the absence of a signature, the law is satisfied with respect to an electronic record if the electronic record includes an electronic signature.

SECTION 16. IC 23-17-13-2 IS REPEALED [EFFECTIVE JULY 1, 2008].

(Reference is to EHB 1187 as printed February 22, 2008.)

Conference Committee Report
on
Engrossed House Bill 1187

Signed by:

Representative Lawson L
Chairperson

Senator Lawson C

Representative Koch

Senator Arnold

House Conferees

Senate Conferees